No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & CO. (Pacific Coast), a corporation,
Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Brief Recapitulation of Appellant's Contentions.

Appellee (sometimes referred to herein as the City) in its answering brief, hotly disputes a few of the propositions advanced by Appellant, but it either passes in silence with apparent acquiescence or says very little about a considerable number of others. To a degree, even the arguments which Appellee purports to answer are arguments other than those made by Appellant. This misdirection of energies by an appellee is common enough, for it is seldom that the appellant and the appellee see the issues in a lawsuit in exactly the same light. Therefore, in order to bring the actual conflict of views into as sharp focus as it can, Appellant should like at this point briefly to recapitulate its arguments.

Appellant made the following points in its opening brief:

First: In the activity here involved the City was a marine terminal operator, essentially a warehouseman. It offered its premises for use by the general public for a price. It was, therefore, under a plain duty to maintain its premises in a safe condition for the protection of the goods stored in response to such an offer. Accordingly, Appellant maintains that the trial court's findings that the City was under no such duty are clearly erroneous. (See Sec. I of App. Op. Br. pp. 28-36.)

Second: The City, in carrying on its terminal business as a warehouseman, acted in a proprietary, not a governmental, capacity. As such, it was subject to the same liability and the same duties as a private individual insofar as concerns all activities connected with the operation of that business, including the maintenance of the warehouse sprinkler system and the water pipelines leading thereto which were located on property under the jurisdiction of and maintained by the City in its capacity as a warehouseman. Plainly, therefore, the trial court committed clear error in finding that the City's liability was to be determined by the more limited and less demanding standard of conduct applicable to a city when discharging a *governmental* function. (See Sec. II of App. Op. Br. pp. 36-41.)

Third: The City clearly breached its duty to maintain its premises in a safe condition by reason of the following circumstances and conditions, each of which compels the conclusion that the trial court committed clear error in not finding that the City failed to exercise reasonable care in the discharge of its duties for the care and protection of Appellant's goods: (1) the City introduced no evidence that the casualty occurred despite the exercise of due care (see Sec. III(j) of App. Op. Br. p.

56); (b) the doctrine of *res ipsa loquitur* is applicable, and the trial court's finding of no negligence is clear error because the City submitted no evidence that the casualty occurred in spite of the exercise of due care to prevent it (see Sec. III(k) of App. Op. Br. pp. 56-58); (c) the City, as the owner in possession of the area of Berth 59, is in this negligence action held to have known what it should have known, and it is plain that the City, by and through its Harbor Department, failed utterly to keep abreast of pertinent matters which affected its operation of Berth 59 as a warehouseman, and, in particular, the City was clearly negligent by reason of its claimed voluntary ignorance of the corrosivity of the soil in the area of Berth 59, and the weakness and probable shorter life of unprotected cast iron pipe in such soil (see Sec. III(1) of App. Op. Br. pp. 58-62); (d) the City by and through its Water Department acted negligently because the Water Department had complete knowledge of all relevant circumstances, and in the circumstances was under a plain duty to communicate its fund of knowledge to the Harbor Department, which it did not do (see Section III(m) of App. Op. Br. pp. 62-64); and (e) the City's admitted policy of "maintenance," based solely on economic considerations, was to do nothing about either inspecting or replacing superannuated pipe until after water appeared on the surface, which policy of expedience was adhered to in this instance even though the pipe in question had apparently leaked water for some time prior to its ultimate destructive failure, and although the reasonable life of the pipe had expired some fifteen to twenty years prior thereto. (See generally, Secs. III and IV of App. Op. Br. pp. 41-72.)

Fourth: Even if it be assumed, *arguendo,* that the governmental standard of care was the applicable standard,

the trial court clearly should have found that the City acted negligently in discharging that duty of care in respect of Appellant's goods (See App. Op. Br. pp. 73-76).

Fifth: It was patent and reversible error for the Court to admit in evidence the so-called "additional" answer given by the City to an interrogatory propounded to the City by Appellant pursuant to Rule 33 of the Rules of Civil Procedure. The admission of that hearsay evidence over plaintiff's objection constituted prejudicial error because it was the only "evidence" which will sustain the trial court's findings that the City's Harbor Department did not have actual notice or knowledge that graphitic corrosion was occurring in the pipelines in the area of Berth 59 (See App. Op. Br. pp. 76-80).

II.

The Findings of Fact Concerning Which Appellant Complains Are "Clearly Erroneous" Within the Meaning of That Term as Used in Rule 52(a) of the Rules of Civil Procedure.

Appellant agrees with the City that Rule 52(a) of the Rules of Civil Procedure states the controlling test for the consideration of certain of the specifications of error made on this appeal. Appellant, however, feels that the extracts from cases set forth by the City in its Appendix "A" do not completely state the principles applicable to a review of the evidence in this case.

The basic test is set forth clearly and succinctly in *United States v. United States Gypsum Co.,* 333 U. S. 364, 68 S. Ct. 525 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at 395, 68 S. Ct. at 542.)

Moreover, generally speaking, where much of the evidence on a subject is of a documentary nature *or* rests on circumstances concerning which there is no dispute, a finding of fact does not command the strong presumption of verity which usually attends a finding.

> *General Casualty Co. v. School District No.* 5, 233 F. 2d 526, 528 (C. A. 9th 1956);
>
> *Smith v. Royal Ins. Co.,* 125 F. 2d 222, 224 (C. C. A. 9th 1942); and
>
> *Kuhn v. Princess Lida of Thurn & Taxis,* 119 F. 2d 704, 705-706 (C. C. A. 3d 1941).

It is Appellant's position that this is a case where the evidence is not to any crucial extent conflicting; that there is no issue as to the candor and credibility of any of the witnesses; and that those factors, therefore, were of no importance or significance in resolving the issues presented to the trial court. Moreover, the Supreme Court, referring to Rule 52(a), observed in the *United States Gypsum Co.* case that even in cases where candor and credibility of witnesses are important, an appellate court is not precluded from reviewing the matter, stating:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. . . . The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however." (333 U. S. at 394-395, 68 S. Ct. at 541-542.)

Appellant submits that in this case the findings of the trial court are not in any sense "dependent" upon testimony involving a judging of the candor and credibility of the witnesses by the trial court in its observation of the witnesses.

It should be noted further that Appellant is not asking, as the City would seem to imply by its quotation from

> *Randall Foundation v. Riddell,* 244 F. 2d 803, 805 (C. A. 9th 1957),

that this Court utterly disregard the findings of the trial court and make its own findings of fact. The City neglected to note the contention upon which this Court was passing in making the ruling quoted by the City. The narrow question which this Court was there considering was phrased as follows:

> "Appellant urges that, since there is a written stipulation as to certain facts, this Court must disregard the findings of the trial court and decide the case on our interpretation of the documents." (244 F. 2d at 805.)

Appellant here makes no such contention. It maintains only that the findings of fact referred to in its Specifications of Error in its opening brief are "clearly erroneous" within the meaning of that term as used in Rule 52(a) of the Rules of Civil Procedure, and that this Court should upon reviewing the entire evidence be left "with the definite and firm conviction that a mistake has been committed."

III.

The City May Not Successfully Claim That It Did Not Owe a Warehouseman's Duty Towards Appellant's Goods.

Section I of Appellant's Opening Brief (pp. 28-36) was directed at the establishment of the relation between the City and Appellant and the nature of the duty created thereby. The trial court found (and there can be no dispute as to this): (1) that it was not true that the City was under any duty to provide a safe place for the storage of Appellant's goods (Find. of Fact No. 8 [R. 102, and See App. Op. Br. p. 7]) and (2) that the City was not a marine terminal operator (Find. of Fact Nos. 3 and 7 [R. 100, 101, and see App. Op. Br. pp. 6, 7]).

Concerning these contentions, the City merely observes without discussion or citation of authority:

> "There is no evidence that the City was a warehouseman; nor is there evidence of any contractual relation between the City and Grace [Appellant];. . . ." (Appellee's Br. p. 20.)

Obviously such *ipse dixit* type comments beg the question. A warehouseman is a commercial bailee. In the definitions section of the California Warehouse Receipts Act, found in Section 1858.04 of the California Civil Code, it is said:

> " 'Warehouseman' means a person lawfully engaged in the business of storing goods for profit."

It is obvious that goods may be placed in a warehouse by the owner, by a common carrier or by someone else. The facilities at Berth 59 were (as appears without dispute from the regulations on tariff) used for the receipt of merchandise discharged from steamships coming into

Los Angeles Harbor, or which was about to be loaded in such vessels. As a matter of fact, it is common knowledge that such uses are precisely what a pierside shed is used for. In this context, therefore, the owner of the merchandise so stored normally is the holder of a steamship bill of lading who has contracted with the carrier who placed the merchandise in the warehouse. This chain of events does not make the City any less a warehouseman, nor does it lessen its responsibility concerning the goods entrusted to it.

A warehouseman who holds his premises out for hire to the public is responsible for their safety, and the finding of fact that there was no duty on the part of the City to provide a safe place for the storage of Appellant's goods, is "clearly erroneous" by any test.

See cases cited in Appellant's Opening Brief, Sec. I(c), pp. 32-36.

IV.

The Trial Court Committed Clear Error in Finding That the City Acted in a Governmental Rather Than a Proprietary Capacity Insofar as Concerns the Activity Here Involved.

The vulnerable jugular vein of the trial court's findings is its finding that the City operated and maintained the eight-inch water line system in the area of Berth 59 as a governmental activity (Find. Nos. 16 and 20 [R. 104, and see App. Op. Br. pp. 10, 11]). Appellant maintains that the operation and maintenance of that water line system was part and parcel of its operation of the warehouse facilities and as such was not severable therefrom; the finding to the contrary involves an error so basic that it necessarily produced an incorrect result in this case.

The City argues strenuously that because the water line system was used solely for fire fighting purposes, all aspects of the operation and maintenance of the water line are thereby clothed in the protective mantle of governmental immunity. The City's position is clearly and demonstrably erroneous, and its authorities cited in support thereof are wholly inapplicable to this case.

The City's attempts to isolate the operation and maintenance of the eight-inch water line system from the operation and maintenance of the warehouse and other facilities in connection therewith, must fail for the water line system is a necessary part thereof and adjunct thereto. It is no more severable from the activity of operating the warehouse than is the maintenance of the warehouse roof. Clearly, the City by and through its Harbor Department acted in a proprietary capacity in connection with the operation of the warehouse, including the operation and maintenance of the eight-inch water line system, a component part thereof.

Before discussing some of the City's authorities, however, it is instructive first to advert to the common sense considerations of this situation. The City was operating for hire a transit shed for the receipt and storage of the merchandise of the public. That, of course, is a function carried on by private individuals as well as by some governmental agencies. Private warehouses commonly have automatic sprinkler systems and just as commonly they have pipelines that are intended to provide water to such systems. Those are matters of common knowledge.

Such systems are an essential part of an effective, safe operation of a warehouse, and frequently, as in this case, a municipality requires in certain cases the installation of an automatic sprinkler system. In operating a warehouse

having in excess of 12,000 square feet the City by and through its Harbor Department was subject to the same requirements as are imposed upon all persons engaging in proprietary activities utilizing structures of that size in Los Angeles. Appellant submits that the City may not engage for profit in this general proprietary activity, and then when something goes amiss seek refuge in the immunity provided for the conduct of governmental activities on the ground that this segment of its operation of the warehouse may be spun off for purposes of determining liability for negligence. The City here is attempting to make unwarranted use of the wholly irrelevant fact that it is a municipality and as such engages in governmental as well as proprietary activities.

It is true enough that a system such as this is a means for fighting a fire. But in the same sense it is equally true that fire doors, concrete walls, special electrical wiring, and all other precautions commonly required by modern building codes are intended to fight fires and to prevent them from spreading.

The automatic sprinkler system (including water lines thereto located on the owner's property) and the fire doors of a warehouse operated by a private individual are not endowed or blessed with any special immunity, governmental or otherwise. It is submitted, therefore, that lacking an authoritative holding to the contrary (and the City has cited none), it is fallacious and clearly erroneous to conclude that an identical facility (together with all of its parts) operated and maintained by the City, is not operated *in toto* in a proprietary capacity, and that merely because the water line system and the automatic sprinkler system are used only for fire purposes it thereby becomes a part of the ordinary fire system such as is maintained

by a municipality in a public street, and as such is effectively sealed off from the imposition of the proprietary standard of care.

There is an obvious and sound distinction between fire fighting facilities which the City provides and maintains as part of its duty to the public in general, *i.e.,* its fire engines and fire hydrants, vis-a-vis the automatic sprinkler system which it installs and maintains for precisely the same reasons and in precisely the same way as any private warehouseman. There is no sound reason in law or in logic for imposing a different and lesser standard of care in the latter instance. Appellant submits that when a city engages in a commercial business, the things it does in the course of that business which are commonly done by private individuals engaging in such a business acquire no sovereign immunity, but must be scrutinized by the ordinary tests applicable to any other person engaging in such a proprietary activity.

It is appropriate at this point to consider the misplaced nature of the City's reliance upon certain language quoted by it (Appellee's Br. p. 32) from

> *City of Richmond v. Virginia Bonded Warehouse Corp.,* 138 S. E. 503, 507 (Va. 1927).

The City here argues that under the rule which it would extract from that case the maintenance of the water mains here involved is an activity which is clothed with governmental immunity by reason of the fact that the water mains were installed in compliance with Section 91.0506 of the Los Angeles Municipal Code [Ex. R], and by reason of the further claimed fact that the water mains were "subject to the superior authority of the Fire Department." (Appellee's Br. pp. 32-33.)

In the *City of Richmond* case (decided 32 years ago) the court was dealing with the following assignment of error by the defendant municipality:

> "The evidence clearly shows that, in offering to the plaintiff free of charge the facilities for preventing the inception and spread of fire, petitioner was exercising a governmental function, for the improper exercise of which petitioner cannot be held liable in damages." (138 S. E. at 506.)[1]

The court there rephrased the city's contention as follows:

> "The suggestion is also made that the object of the sprinkler was to prevent fires, and that the public was interested as well in preventing fires as in extinguishing them after they have started; that no charge was made for the water used by the sprinkler in extinguishing fires, and hence the act of the city in furnishing water to the sprinkler should be classed as a governmental act in like manner as the acts of the fire department." (138 S. E. at 507.)

The Court rejected that contention, stating:

> "The city had a right to charge for the water used by the sprinkler, and the fact that it did not is no answer to the charge of negligence of the city resulting in the damage of the plaintiff. Even a volunteer or a stranger is liable for an injury negligently inflicted on the person or property of another." (138 S. E. at 507.)

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[1]The City incorrectly states that in that case "the warehouse company *bought* the water from the City." (Appellee's Br. p. 31; emphasis added.)

It is obvious that the thrust of the argument which the Court dealt with in that case was the contention concerning the effect of furnishing water without charge. The Court merely rejected any such arbitrary distinction. Moreover, the implication in the opinion to the possible effect that if police regulations require the installation of a sprinkler system governmental immunity might attach, is most ambiguous. That language, relied upon by the City in this case, is as follows:

> "Such installations, when not required under police regulations, are made by municipalities in their private or proprietary capacity." (138 S. E. at 507.)

Initially, it is difficult to understand why the Court referred to installations made by "municipalities" rather than by private individuals. It was the private individual, not the city, which had made the installations which were involved in that case.

Further, it is clear from the authorities cited by the court in the *City of Richmond* case,

> *Keystone Investment Co. v. Metropolitan Utilities Dist.,* 202 N. W. 416 (Neb. 1925);
>
> *Gordon & Ferguson v. Doran,* 111 N. W. 272 (Minn. 1907); and
>
> *J. W. Edgerly & Co. v. City of Ottumwa,* 156 N. W. 388 (Iowa 1916),

that the court's references there to installations being required by police regulations and to "compulsion" by the city, were derived originally from consideration of arguments advanced in the cited cases by a private individual that a utility's rates for water supplies to a sprinkler system installed on the individual's premises were unreasonable and discriminatory. The utility invariably countered with claims that such installations were put in by

the individual voluntarily for his own private benefit, and that the utility had to maintain larger mains, larger pumping capacities and incur other burdens in maintaining their water systems because of such installations by private individuals, and that such burdens justified the increased charges for water to such persons. Accordingly, the language upon which the City pins its hopes has no real applicability to the question presented here, *i.e.,* that of determining whether one aspect of the operation of the business of a warehouseman involves a proprietary or a governmental function.

In any event, if the argument of the City predicated upon the language it quotes from the *City of Richmond* case is carried to its "logical" conclusion, it becomes illogical in the extreme. It would mean that where a police regulation requires the installation of an automatic sprinkler system, all warehousemen (and any other person coming within the scope of the regulation) installing such a system would enjoy governmental immunity with respect to its operation and maintenance. It would mean that every such warehouseman (or other person) would to a slight degree act in a governmental capacity in one facet of his operations. Such a result is palpably ridiculous.

Appellant knows of no case which applied such a novel theory.

In

Schell v. Miller North Broad Storage Co., 45 A. 2d 53 (Pa. 1946),

the Supreme Court of Pennsylvania was confronted with a case involving a claim of negligence arising out of the failure of fire doors to operate correctly during a fire which destroyed the plaintiff's goods. The case was tailor-

made for the application of the approach suggested by the City here. The court there, however, pointed out the absurdity of a contention grounded in the assumption that the duty of the operator of a warehouse ended with compliance with applicable statutes and ordinances, stating:

> "This brings us to the principles of law which govern this phase of the case. Appellee contends that it installed the doors because it was required to do so by applicable statutes and ordinances, that they conformed to the requirements of the law, and that therefore it performed its full duty. This cannot be approved as a correct statement of the law. Everyone knows that even automatic devices do not continue to operate indefinitely without human attention. A prudent householder has his thermostat and the connected apparatus inspected periodically, perhaps, annually, and repaired if necessary. Installing the fire doors according to a statute or an ordinance was not the full measure of appellee's duty. It was obliged to maintain them in such condition that they would perform the function for which they were installed." (45 A. 2d at 56.)

Turning to the next facet of the position espoused by the City, it is clear that the pipelines here involved were maintained by the Harbor Department, not by the Fire Department, of the City of Los Angeles. The City does not even use the term "operate" or "maintain" in connection with these pipe lines; it makes only the equivocal statement that they were "subject to the superior authority of the Fire Department." (Appellee's Br. p. 33.) What the City leaves entirely unstated is the fact that the so-called "superior authority" becomes operative only in the event of a fire. Here, of course, there was no fire. The damage did not occur as a result of anything done or

not done by the Fire Department or by any other department during a fire. The City does not claim that the Fire Department had control over the installation or maintenance, including inspection and replacement, of the water lines. Obviously only the Harbor Department had such control. Language from the *City of Richmond* case is most apt to this contention:

> "The work to be done in the instant case appertained to the city water department, and the negligence proved was that of an employee of that department. The city, therefore, cannot defend on the ground that the negligence occurred in the exercise of a governmental power." (138 S. E. at 507.)

Here the work to be done was the proper maintenance of the eight-inch water line system, and that work was the work of the Harbor Department. The negligence proved was that of the employees of that department. The City, therefore, cannot defend on the ground that the negligence occurred in the exercise of a governmental power.

The City also appears to argue that where there is a separate water system maintained by a municipality for its fire department governmental immunity attaches to such an operation. But even if that were true (and the City has cited no case so holding), manifestly that is not the case here. There is no separate water system maintained by the City throughout its jurisdiction for the use of the Fire Department. The eight-inch water system here was maintained by the City because through its Harbor Department it was engaging in a proprietary activity, and it had to have water supplies for its automatic sprinkler system. There is, of course, no evidence that the City installed such a system for all other operators of warehouses (or other persons required to have such systems) within its jurisdiction.

V.

The Trial Court Committed Clear Error in Not Finding That the City's Conduct Constituted Negligence Under the Proprietary Standard of Care.

(a) Preliminary.

In Section III of Appellant's Opening Brief, Appellant discussed the clear error committed by the trial court in not finding that in the circumstances the City acted negligently in respect of Appellant's goods, and, in particular, that the City's "do nothing" policy concerning inspecting and replacement of its water lines constituted negligent conduct. The City's scattered response to that contention is found in its Section I and in its "Statement of the Case." In essence the City now appears to claim that it was *not* the City's policy to "do nothing," and even if it was, the policy was a reasonable one. These arguments will be taken up in order.

(b) The City's "Do Nothing" Policy.

At page 16 of its brief the City makes the startling statements that it does not agree that the Harbor Department adopted a "do nothing" policy concerning inspection and replacement of its water lines; that the trial court referred to a "do nothing" policy with respect to inspection "but not as to 'replacement' "[2]; and that "this [*i.e.*, the policy to 'do nothing'] was not in the Findings."

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[2]The City's precise statement on this point is:

> "It is true that the trial court's opinion, removed from its context, uses the phrase 'do nothing' with respect to inspection —but not as to 'replacement' . . ." (Appellee's Br. p. 16.)

This statement engenders some doubt in Appellant as to what is meant by removing the trial court's opinion "from its context," but apparently the City's attack is two-pronged: (1) there was not a "do nothing" policy as to either inspection or replacement, and (2) in any event there was not a "do nothing" policy with respect to replacement.

This contention is entirely devoid of merit. The trial court upon the basis of uncontradicted evidence[3] found in Finding No. 11 [R. 102-103]:

> ". . . it is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed."

Moreover, the only witness who testified directly on the subject stated that the Harbor Department had a policy of not reading the detecto meters which were installed on the laterals [R. 187] even though it could have done so [R. 278].

The findings, clearly in the disjunctive, may not now be impugned by the City. It is settled, therefore, that for purposes of this appeal the Harbor Department *did nothing until it discovered water on the surface;* that it conducted no periodic inspections; and that it had no program at all for periodic replacement of superannuated pipe, whether it was protected or unprotected cast iron pipe, and whether in "hot" soil or not.

(c) The Contention That the "Do Nothing" Policy Was a Reasonable One.

The City advances a number of reasons why its policy was reasonable and Appellant will deal with each reason separately.

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[3]This evidence includes the City's own answers to interrogatories. [R. 143-4, 150-1, 152, 157, 159-160.]

(1) The "No Prior Failure" Argument.

Relying solely on the testimony of Charles V. H. Brashier, the City's plumber, the City makes these assertions:

> "Prior to this break, there had been but one corrosion failure of Harbor Department pipe in the area, which occurred about 1926 [R. 435]." (Appellee's Br. p. 5.)
>
> "In this 40 year period the only corrosion break in the entire system of more than 10 miles of pipe was the one under Municipal Warehouse No. 1 [R. 436-437]." (Appellee's Br. p. 5).

Those assertions obviously strike at the heart of Appellant's Specification of Error No. 9 (App. Op. Br. pp. 21-24, 76-80) dealing with the improper admission of an "additional" answer by the City to an interrogatory propounded under Rule 33 of the Rules of Civil Procedure. That aspect of this matter is also considered in a later portion of this brief directed specifically at the City's response to Appellant's contentions concerning that specification of error.

Turning first, however, to Mr. Brashier's testimony, it is clear that it was merely to the effect that *he did not know* of any breaks other than the one in 1926 [R. 435-436]. The record is barren of proof that he was in a position to know of all failures or the reasons therefor. On the contrary, he conceded he wasn't present when the two pipes involved in Appellant's Specification of Error No. 9 were taken out [R. 450-451], and he further testified:

> "I have been on vacations and been away and there could be things done, when I was not present when they were done." [R. 451.]

Moreover, there is a complete absence of proof that Mr. Brashier was qualified to make a diagnosis of graphitic corrosion as the cause of a break. His testimony was that he had seen only two breaks involving corrosion, the pipe involved in this action, and the incident of 1926 [R. 449].

Other evidence bearing upon prior pipe failures known by the Harbor Department to be due to graphitic corrosion is found in the City's original answer to Plaintiff's Interrogatory No. XIV(b) which was put in evidence by Appellant [R. 156-157]. That answer established that the Harbor Department had experienced two prior failures of cast iron water pipe due to corrosion, one in 1954 at Berth 60 and another in 1955 at Berth 59 itself. Over Appellant's objections there was received in evidence a later and "additional" answer to the said interrogatory (voluntarily made and filed without leave of court) which claimed, without stating why, that the original answer was in error and that in fact neither of the breaks was due to corrosion [R. 163-164].

Appellant submits that even if its Specification of Error No. 9 is not sustained in its entirety, the City's "additional," self-serving answer to the interrogatory is insufficient basis for deterring this Court from arriving at a "definite and firm conviction that a mistake has been committed" by the finding that the City did not know or have notice of the defective condition of the pipelines (Find. No. 22 [R. 105, and see App. Op. Br. p. 13]), and by the finding that the City did not know or have notice nor should it have known or had notice that the eight-inch pipeline was subject to deterioration and failure from graphitic corrosion (Find. No. 23 [R. 105, and see App. Op. Br. pp. 13-14]). This is so because the

"additional" answer is nothing more than a naked disclaimer of the truth of the original answer; it contains no explanation of or reason for the claimed "error." The City, of course, was in possession of all records concerning these two breaks. The City's employees examined the pipes after each break. The records pertaining to the breaks were not produced by the City. The persons who examined the pipes were not called to testify by the City. Applicable, therefore, was the familiar rule that when there is material testimony which would establish a fact in issue and which is in the present ability of the party to present and he fails to do so, and fails to offer a reasonable excuse for such failure, the presumption follows that such testimony, if presented, would be against such party.

Hann v. Venetian Blind Corporation, 111 F. 2d 455, 459 (C. C. A. 9th 1940); and

Perry v. Paladini, Inc., 89 Cal. App. 275, 280-281, 264 Pac. 580 (1928).

It is clear, therefore, that the only "definite and firm conviction" which can come from a review of the evidence in this case is that there was a prior graphitic corrosion break in the same warehouse here involved, and that the Harbor Department had actual knowledge concerning it.

(2) The Contention That the Soil Is Not Highly Corrosive.

As is readily apparent from consideration of the evidence specified in Section III(e) of Appellant's Opening Brief (pp. 46-48) the evidence is without conflict that the soil in the vicinity of the break was highly corrosive. The City, however, apparently recognizing some

what belatedly the crucial nature of this testimony,[5] now attempts to attack the credibility of the testimony given by Mr. James F. Brennan, an expert witness called by Appellant, by singling out a small part of his testimony.

In its efforts, however, the City distorts the testimony actually given. It reviews the testimony of Mr. Brennan, and in particular relies on the results of what it calls "Brennan's test No. 2," concluding with this misleading bit of argument in its "Statement of the Case":

> "It is clear from the foregoing why the trial Court ignored Brennan's testimony concerning his soil tests." (Appellee's Br. p. 11).

Counsel for the City must not have reviewed the record with any thoroughness, for any attempt to connect "Brennan's test No. 2" with any determination made by the trial court concerning his testimony as to soil tests, is a gross misconstruction of the record. With reference to the said test No. 2 Mr. Brennan testified that the sample was no good and couldn't be used [R. 392-393] and that:

> "This is completely invalid. There wasn't sufficient quantity for the test, but I ran it anyway." [R. 393.]

When counsel for the City attempted to shake that testimony, the trial court admonished:

> "Counsel, you are arguing with the Witness. You are trying to get the witness to say something he hasn't said. He has told you two or three times the sample was so small he couldn't use it." [R. 393.]

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[5]This is so because Mr. Ashline, the City's corrosion engineer, and Mr. Brennan, one of Appellant's experts, agreed that in highly corrosive soil, unprotected cast iron pipe such as was installed in this case, has a reasonable life expectancy only of around 20 years, after which it is an extremely poor gamble. [R. 277, 338-9, 341-3.]

Mr. Brennan then testified that because that sample was too small he came to Los Angeles and got samples that were adequate for the purpose of making a Corfield corrosivity test [R. 394].

The suggestion by the City that the trial court did not believe that the soil in question was "highly corrosive" is utterly without foundation. The trial court was firmly of the opinion that the pipe was installed in "highly corrosive soil" [R. 273, 275], and in this connection it observed in its Opinion:

> "At the time of installation defendants did not know of the corrosive nature of the soil, but subsequent to the installation the City, or some of its departments, became cognizant that the soil in the harbor area was highly corrosive." [R. 84.]

The record is replete with testimony concerning the "hot" nature of the soil in the area of Berth 59. The City did not put in any evidence that this was not a "hot" area. As a matter of fact the trial court expressed incredulity that the City would contend the area was not "hot," saying to counsel for the City:

> "Counsel, you are not going to contend this is not hot soil, are you?" [R. 389.]

Counsel for the City evaded that question and in a like manner continued to evade the persistent questions of the trial court:

> "Are you going to contend it was not a hot area?" [R. 389.]

> "Are you going to have any witnesses who will come in and tell me this is not a hot area?" [R. 390.]

The City produced no such witnesses. All of the experts agreed that the soil was highly corrosive.

The basic question here is whether a warehouseman can without responsibility follow the policy of patching pipe when it breaks because that policy is less expensive than periodic planned replacement, and thereby transfer the risk of damage to its customers. It is productive of nothing but confusion for the City to contend at this late stage that the soil was not corrosive.

(3) The Custom Argument Advanced by the City.

Another spurious issue which the City seeks to introduce into the question concerning the custom evidence offered by the City, is that raised by the statement:

> "Appellant's oft-cited statement that the City's decision not to dig up or inspect buried pipe was based upon 'economy' . . . or 'economic grounds' . . . is not supported by the record. The policy is stated in Finding 11 [R. 102]." (Appellee's Br. p. 16.)

Finding No. 11 states in pertinent part:

> ". . . it is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed." [R. 102-103.]

If that policy does not rest upon economic considerations, it has no foundation at all. The trial court obviously so believed, and observed in its Opinion:

> "Based upon *economic consideration,* defendants established a policy of doing nothing about maintaining, repairing or replacing such water pipe-lines until a leak occurred and water was discovered on the surface of the ground." [R. 84; emphasis added.]

The City itself states in purported justification of its conduct that the only way one can tell whether a pipe has graphitized is "to completely expose the pipe along its entire surface, and that this was *uneconomical,* unrealistic, unsafe and impractical." (Appellee's Br. p. 22; emphasis added.)

Further, in another portion of its brief the City argues that the service laterals could not be "economically" replaced, stating:

> "Appellant asserts (App. Op. Br. 54) that short lengths of pipe, such as service laterals, could be economically replaced. The service laterals were estimated by Appellant's witness, Montgomery, to be a approximately 100 feet in length [R. 322] and he thought there were 3 of them [R. 323]. In fact, there were at least 14 of them [Ex. U] extending in both an easterly and westerly direction from the Water Department's 10 inch main." (Appellee's Br. p. 20).[6]

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[6]The City should have read the next paragraph in the record. It discloses that counsel for the City completely cleared up any uncertainty concerning Mr. Montgomery's opinion, as follows:

> "Q. You just assumed that there were two leads into each warehouse. I will get that map and maybe it will be helpful. This map, Mr. Montgomery, has been introduced here in evidence. This is the transit shed at 57, and then I will point to the one at 58. Here is the one at 59 Then there is one at 60. That is to get you oriented. We are looking north up toward the top of this map. Now, then, this map shows that off of the fire main there are two fire service leads going into each of these sheds, so there would be eight of those leads. Do I understand that it would have been your recommendation that all of the leads be removed? A. Yes." [R. 323.]

The other 6 laterals were on the other side of the street and Mr. Montgomery expressly declined to express an opinion as to their replacement, pointing out that the damage which might be caused by a break on the other side of the street would not be as great as on the side where the transit sheds were located. [R. 323.]

The backbone of the City's justification for its "do nothing" policy lies in the so-called "custom evidence" that for reasons obviously founded solely in economic considerations it is customary for *water companies* to leave water pipes in the ground until the time there have been so many breaks as to compel the conclusion that it will be more costly to continue that policy as to a given line than it would be to replace it entirely [R. 258-260].

Mr. Ashline, the City's corrosion engineer, testified that "ten to perhaps twenty years" is the expected life of poorly protected or unprotected pipe in corrosive soils [R. 277]. Mr. Brennan, one of Appellant's experts, testified that "two-thirds of all failures of cast iron pipe in a corrosive environment such as this would occur between the ages 10 and 35 years with a mean of 25" [R. 341], and that the chances were nine out of ten that such pipe wouldn't last 25 years [R. 342-343].

The testimony by Mr. Ashline is to the further effect that generally the City does not replace pipe until it is obsolete or until it has had "recurring leaks" and the street was to be resurfaced anyway [R. 259-260]. Mr. Ashline and Mr. Brennan each testified to the effect that the "do nothing" custom rests on considerations of economy [R. 258-260, 369].

The precise question presented, therefore, is whether the "do nothing" custom of water companies justifies such nonmaintenance of pipes in soil known to be corrosive and which soil is in the area of a warehouse containing valuable goods. From the authorities cited by Appellant in its opening brief (pp. 64-72) it seems clear that a custom having its roots in economic grounds provides no justification for the deliberate, continued use of a pipeline unsuitable to the situation and where it is known or should

have been known to be dangerous. Accordingly, where a duty of care exists, a custom founded on economic considerations affecting the person under the obligation, rather than upon considerations of due care, is simply no defense.

The City apparently misconceives Appellant's contention concerning the custom evidence. Appellant contends merely that the custom evidence offered by the City has no logical relevance to the standard of care required in the circumstances here, *i.e.,* the operation of a warehouse and the water lines in connection therewith, in an area where the soil is known to be corrosive (or which in the exercise of reasonable care should have been known to be), and where the water lines are so located as to cause substantial damage to valuable goods in the event of a rupture.

On the question of possible damage, the City argues:

> "Water pipes, mains, valves and joints frequently leak, but damage is the exception rather than the rule, particularly with respect to pipes buried 9 feet underground." (Appellee's Br. p. 23.)

But the City does not refer to any evidence in this case which supports that gratuitous assertion. Appellant submits that there is no such evidence, either to that effect or that some unusual set of circumstances caused the damage in this case. The plain, uncontradicted fact is that the City installed this pipe and then ignored it until it broke. Further, the City cites no authorities in support of the novel implication that where damage "is the exception rather than the rule," there can be no negligence for allowing the damage to occur.

The authorities cited by the City on this question of custom have no application here, and in fact support Appellant's contention. Thus, the quotation from

> 2 Witkin, Summary of California Law, pp. 1764-1765,

by the City at page 23 of its brief, recognizes that custom is relevant only when it is "the practice of others similarly situated" or the practice of others "performing similar acts under similar conditions." The custom testimony tendered in this case was as to the practice of water companies; it was not the custom of persons operating warehouses containing valuable goods. It was not the custom of "others similarly situated," and there were crucial differences in the "conditions."

The selection of extracts which the City presents (Appellee's Br. p. 23) from

> *Anderson v. County of Santa Clara,* 174 A. C. A. 171, 344 P. 2d 421 (1959),

distorts the holding of the case and is quite misleading. First, the "standard approved practice" consisted of a very careful and cautious approach to burning, including frequent and regular inspections. In addition, a burning permit had been obtained and a nearby forestry station had been notified of the general area in which the burning would be done. Thus, there was not only evidence as to "standard approved practice," but evidence as to the notification of the forestry station, and the careful method of burning which included regular and frequent inspections. It was the total evidence which the court referred to by use of the language "Such evidence," not merely the evidence as to "standard approved practice."

The City's attempt to distinguish

Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220, 224-225, 43 Pac. 117 (1896),

cited by Appellant (App. Op. Br. p. 71) borders on the ridiculous.

The City states:

> "In view of the many buried pipe cases available, it would seem that the *Redfield* case has no bearing on this case." (Appellee's Br. p. 26).

The City, however, does not cite a single case (buried pipe case or otherwise) holding that custom based on economy considerations has legal relevance to the establishment of a proper standard of care. Appellant submits that the principle of the *Redfield* case has universal application, and in particular has application to this situation, as it demonstrates that the custom evidence here offered has no legal relevance in that it originated in motives of economy and not from considerations based on the proper discharge of a duty toward others.

As appears from the authorities cited by Appellant (App. Op. Br. pp. 68-72) the very essence of the duty of care imposed by the law of negligence is that it involves the imposition of a standard which is fixed for the protection of persons other than the actor, the defendant. Clearly, therefore, the City here, by accepting as its guiding principle the policy that pipes should be replaced *only* when they become obsolete or break so often that the cost of replacing them is less than the cost of continuing to repair them break by break, has failed to act in a manner reasonably considerate of the safety of Appellant's goods. Such a policy, if allowed to stand as the measure of reasonable and due care, would effectively re-

lieve the City of its duty as a warehouseman simply because its Harbor Department and all water companies have customarily paid no attention to their duty. This sort of bootstrap improvement in a legal position by importing the questionable standards of another and dissimilar business should not prevail.

(4) The Argument That Cast Iron Pipe Frequently Lasts a Long Time.

The City is quite enamored of the admitted fact that cast iron pipe in some instances has been used for a long time. In this case the evidence is clear that in *non-corrosive* soils, cast iron pipe may last 150 years. But such evidence is of no assistance in determining the probable life of such pipe in *corrosive soil.* It requires no citation of authority for the proposition that the length of time that non-protected cast iron pipe will last in non-corrosive soil has no relevance to its probable life in corrosive soil.

The City doggedly refers to the fact that the Internal Revenue Service prepared a Bulletin F [Ex. N] showing, for tax purposes, the life of cast iron pipe, and indicating an average life of 75 years for 8 to 10 inch cast iron pipe (Appellee's Br. p. 12). But again, the average life of pipe in all soils (even if known and acted upon) is no proper guide to determining its life in corrosive soil. Here we have positive, uncontradicted evidence concerning the probable ordinary life of cast iron pipe in corrosive soil.

The City also purports to find some comfort in the admitted fact that there is considerable variation in the life of cast iron pipe in corrosive soil. However, since the City's corrosion engineer, Mr. Ashline, and Appellant's

expert, Mr. Brennan, agreed that 20 to 25 years was the average life to be expected in these circumstances [R. 277, 341-343], and no one testified that this pipe reasonably could have been expected to last for 42 years, it is clear that the pipe here involved long prior to 1956 had passed the age when its failure reasonably was to be expected. In fact, in terms of probability, by 1956 its future life hung by a very slender thread of chance.

The irrelevance of the fact that the pipe here lasted 42 years is demonstrated by

> *Monaghan v. Rolling Mill Co.,* 81 Cal. 190, 193, 22 Pac. 590 (1889),

where a chain suspended from a hook had fallen upon and injured the plaintiff. In response to the defendant's protestation that the chain had hung suspended there for a number of years without accident, the court said:

> ". . . [B]ut that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods." (81 Cal. at 193.)

The only defense tendered by the City in support of this knowing defiance of the law of probabilities is that it is customary among water companies to allow pipe to remain in the ground until it breaks. Again, it is submitted that although that may be prudent practice from a strictly self-serving, economic point of view, it necessarily involves totally ignoring the duty of care owed to the public by a warehouseman who offers his facilities to the public for hire.

(5) The Argument That There Was No Duty to Dig the Pipe Up and Inspect It.

In its Appendix "C" entitled: "Authorities From Other Jurisdictions Holding That Failure to Dig Up and Inspect a Buried Cast Iron Pipe Is Not Negligence," the City cites, briefly discusses and quotes from a number of cases. A reading of these cases demonstrates that in none of them was the corrosive quality of the soil proved, and in none of them was it proved that the pipe was of such an age that it had long since passed the time when a failure should have been expected as a matter of probabilities. It is equally clear that in none of them was the issue the ascertainment of the standard of care owed by a warehouseman with an affirmative duty of care toward goods which it had been hired to store in its facilities.

A closer look at *additional* factors in the cases cited by the City is useful in demonstrating further their complete inapplicability.

In

A. J. Brown & Son v. City of Grand Rapids, 251 N. W. 561 (Mich. 1933),

the pipe which broke was *in a street.* In addition, it will be observed from the quotation set forth by the City (Appendix "C" p. 9) that failure to make tests and inspections was excusable only "where there had been no previous trouble." Here, of course, Appellant contends that the proof is that there had been "previous trouble."

In

Philadelphia Ritz Carlton Co. v. City of Philadelphia, 127 Atl. 843 (Pa. 1925),

contrary to the admitted practice in the instant case, it appears that:

> "Regular inspection was had of the entire system, and any observable dangers promptly rectified." (127 Atl. at 844.)

Further, the cause of the break was due to a flaw in the material which could not have been found by any reasonable test. Here, of course (1) the cause was graphitic corrosion, (2) the corrosive nature of the soil was both known and readily discoverable, and (3) the failure of the pipe within 42 years was readily predictable.

In

Republic Light & Furniture Co. v. City of Cincinnati, 127 N. E. 2d 767 (Ct. of App. Ohio, 1954),

the break occurred in a water main *under a thoroughfare,* and the court expressly stated that the standard by which the defendant's conduct was to be tested was:

> ". . . the care which *reasonably prudent operators of waterworks* are accustomed to use under circumstances similar to those existing in the instant situation . . ." (127 N. E. 2d at 770; emphasis added.)

The court there pointed out that there had been "a complete failure in the attempt to show a standard of care employed by those situated similarly to the defendant." (127 N. E. 2d at 772). Here, however, the applicable duty was not that of an operator of a waterworks.

Further, the court there stated:

> "No evidence was submitted from which it could be concluded that the city should have been put on notice of the prospect of possible failure of the water main here involved." (127 N. E. 2d at 772.)

In the instant case there is considerable such evidence, and it has been referred to in detail in other portions of Appellant's briefs on this appeal.

In

Taphorn v. City of Cincinnati, 122 N. E. 2d 307 (Ct. of App. Ohio, 1953),

as appears from the quotation set forth by the City (Appendix "C" p. 12):

> "There is no technical or expert testimony in the record as to the life of a cast iron water main, such as was installed here." (122 N. E. 2d at 308.)

In the instant case there is, of course, considerable, uncontradicted expert testimony concerning the probable life of the cast iron water main installed here, and it is uniformly to the effect that this pipe was "living on borrowed time." Further, as appears from the same extract set forth by the City, the court there was concerned only with the standards used by prudent operators of a waterworks system, not of a warehouse.

In

City of Richmond v. Hood Rubber Products Co., 190 S. E. 95 (Va. 1937),

the only question was whether the city had the requisite notice that a water meter was defective; it has nothing to do with any duty to inspect or replace water pipes.

In

Midwest Oil Co. v. City of Aberdeen, 10 N. W. 2d 701 (S. D. 1943),

the water main which broke was located *in a street,* and there was no evidence which showed the cause of the break in the pipe. Further, as appears from the extract set forth by the City (Appendix "C" p. 14), in that case there was evidence that the pipe "was of a type that should last for years in excess of the time this main was in the ground." Here, of course, all the evidence is precisely to the contrary. Accordingly, it would appear, in the language of the *Midwest Oil* case, that in the instant case *there was* "occasion for the city either to replace or inspect the pipe following its installation." (10 N. W. 2d at 704).

In

A. Da Prato Company v. City of Boston, 134 N. E. 2d 438 (Mass. 1956),

the pipe had been laid *in the street,* and as appears from the extract set forth by the city (Appellee's Br. p. 14):

> "There was no evidence here that the pipe in question . . . was of a kind which after the length of time it had been in the street could not safely be used." (134 N. E. 2d at 439.)

Here, of course, as has been demonstrated, there was uncontradicted and unequivocal testimony to that effect.

Likewise, in

Stein v. City of Newark, 52 A. 2d 66 (Cir. Ct. of Essex Co. N. J., 1947),

the pipe which broke was *at an intersection of two streets,* and as affirmatively appears from the extract set forth by the City (Appellee's Br. p. 15): (1) there was no evidence to indicate what caused the break, and (2)

there was no evidence that a pipe as old as the one which broke could not "safely be used." In the latter connection, in another portion of the opinion, the court stated it was impressed with the rules in Massachusetts, and quoted from a Massachusetts case in which it is noted:

> " 'Nothing appears to show the ordinary life of the pipe . . .' " (52 A. 2d at 69.)

It should be remembered that in none of the cases cited by the City in its Appendix "C" was it the duty of a warehouseman which was at issue, nor was there proof that the soil in the area of the break was corrosive or that the expected ordinary life of the pipe in such soil had long since expired or had even been reached.

Appellant, in its understandable zeal to distinguish the City's cases, undertook to "Shepardize" them. In so doing Appellant was led to a case not heretofore cited by either party but which is strikingly in point. It is

> *Yearsley v. City of Pocatello,* 210 P. 2d 795 (Idaho 1949).

That case is most instructive on the basic question of what constitutes the use of ordinary care and skill in maintaining water pipes, and, in particular, it holds that a person maintaining water pipes *must* take notice of the expected life of piping in the soil in which it is located and the likelihood that it will become defective and develop leaks so as to cause possible damage.

Although the facts are set forth briefly in the opinion, they are expanded upon in a subsequent opinion rendered by the same court on the second appeal in the same case,

> *Yearsley v. City of Pocatello,* 231 P. 2d 743 (Idaho 1951).

On the first appeal the court reversed the judgment for the plaintiff because of an error in instructions to the jury, but on the second appeal the court reaffirmed its pronouncements made on the first appeal, and affirmed a judgment for the plaintiffs rendered on a trial to the court on the record made in the previous trial and without introduction of any further evidence.

The facts were substantially as follows: The plaintiffs brought an action against the City of Pocatello for damages to their house alleged to have been caused by water negligently escaping from a leak in the City's municipally-owned water plant. They charged that the City failed and neglected to repair and maintain its water system. The City denied that it had been negligent and denied that any leaks occurred in its system and claimed that any damaging leaks were in pipes belonging to the plaintiffs.

There was a substantial conflict in the evidence as to whether the damage was caused by leaks from the water line of the City or from leaks in pipes in a neighbor's adjoining premises. Further, as stated by the court on the first appeal:

> "There was testimony that the soil in that vicinity was of such a nature as to be markedly injurious to the pipe; that the average life of pipe, i. e., free from wear and tear, cracks and leaks in that locality was about twenty years, though some had lasted longer and some had corroded through in as short a time as three years; that it was the practice of the City to wait until a leak developed and its existence ascertained before the pipe was replaced or repaired." (210 P. 2d at 796.)

The water line of the City in that particular area had been in the ground some twenty-seven years, and in parti-

cular the pipe in the ground which served the plaintiffs had been there twenty-seven years and was badly corroded, rusted and worn.

The court laid down three applicable rules of law on the first appeal and restated them on the second appeal as follows:

> "While a city is not an insurer of the condition of its water system, it is bound to use ordinary care and skill in constructing and maintaining it. Yearsley v. City of Pocatello, supra.
>
> Likewise the city is bound to take notice that its pipes are liable to deteriorate from time and use and it must take such measures as ordinary care would dictate to guard against the leaking of its water system due to deterioration of the pipes used in its construction. Yearsley v. City of Pocatello, supra.
>
> A city is not liable for damages occasioned by a latent defect in its water system in the absence of notice, express or implied, of such defective condition; it must have actual notice or the defect existed for such a length of time *or* under such conditions that it should have known of the defect. Yearsley v. City of Pocatello, supra." (231 P. 2d at 747; emphasis added.)

On the first appeal the court specifically approved the following instruction, which, it stated, was in line with the point made in the second paragraph of the extract set forth above:

> "You are instructed that the defendant, City of Pocatello, was bound to use ordinary care and skill in constructing and maintaining its water system. You are further instructed that that the City of Pocatello was bound to take notice of the life of the

piping and the likelihood of the water pipe used and maintained by the defendant City in serving the plaintiffs' residence, to become defective and to develop leaks and to cause possible damage." (210 P. 2d at 797, Footnote 3.)

The instant case is an *a fortiori* proposition. Here, the City took no notice at all of the life of the piping or the likelihood that it would become corroded, break and cause damage. Here the soil was highly corrosive; the probable life of unprotected cast iron pipe was approximately twenty to twenty-five years in such soil; the pipe had been allowed to remain in the ground 42 years; and the pipe was so located as to cause substantial damage in the event of a rupture. *The City, however, did nothing;* it did not even attempt affirmatively to inform itself fully or at all concerning the probable life of the piping and the likelihood that it would become defective and rupture. The defect here arose under such conditions that the City should have known of its existence. This, therefore, is a clear case of negligent conduct.

VI.

There Is No Merit to the Argument That the City Was Not Negligent Under the Governmental Standard of Care.

Contrary to the assertion by the City (Appellee's Br. p. 36), Appellant did not "ignore" the requirement that under the Public Liability Act notice must be brought to the department authorized to take corrective action, *i.e.,* the Harbor Department in this case. Appellant made the straightforward contention that the requisite notice existed in the Harbor Department (App. Op. Br. pp. 73-76).

Appellant again desires to point out (1) that under all the evidence admitted in this case the trial court committed clear error in not finding that the City failed to exercise even the care required by the governmental standard, and (2) if Appellant's Specification of Error No. 9 concerning the improper admission of an answer to an interrogatory is sustained, an even clearer case exists for determining that the City failed to meet the governmental standard, for the admissible evidence is uniformly to the effect that the City had the requisite notice that its "do nothing" policy constituted a "dangerous or defective condition," which maintenance practice inevitably permitted a "dangerous or defective condition" to arise in the water line and to continue until it caused damage to Appellant's goods.

VII.

There Is No Merit to the Argument That the Exculpatory Clause in the City's Tariff Exonerated the City From Liability.

The contention that the so-called "exculpatory clause" in the City's tariff exonerated the City from liability is wholly devoid of merit for at least six separate reasons.

(1) The short and complete answer to this contention is that a warehouseman such as the City is in this case, may not in anywise impair his obligation to exercise reasonable care. The basic justification for this restraint on the freedom of contract is found in the following maxim:

> "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Cal. Civ. Code, Sec. 3513.)

The California Warehouse Receipts Act has since its first enactment (Stats, 1909, Ch. 290, Sec. 21, p. 441) provided that a warehouseman (*i.e.,* a person lawfully in the business of storing goods for profit) shall exercise the following care:

> "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care." (Cal. Civ. Code, Sec. 1858.30.)

The full extent to which the proper discharge of that duty is a part of the public policy of the State of California is made evident by Section 1858.12 of that Act, which provides:

> "A warehouseman may insert in a receipt, issued by him, any other terms and conditions; provided, that such terms and conditions shall not—
>
> (a) Be contrary to the provisions of this article.
>
> (b) In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

The California Warehouse Receipts Act has so provided since its enactment in 1909 (Stats. 1909, Ch. 290, Sec. 3, p. 437). It has long been the rule in California that warehousemen and other such persons engaging in the business of acting as a bailee for hire by the public may

not by contract exempt themselves from damages resulting from their own negligence.

England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 571-572, 271 Pac. 532 (1928); and

Morse v. Imperial G. & W. Co., 40 Cal. App. 574, 576, 181 Pac. 815 (1919).

In the *England* case the court had occasion to consider this precise problem and it announced the following rule for California:

> "But a warehouseman may not limit his liability for damage or loss of goods stored with him for hire, so as to exempt himself from damages resulting from his own negligence, nor to relieve himself from the exercise of ordinary care. The trend of modern authorities holds that such an effort on the part of a bailee to exempt himself from negligence is contrary to public policy [citing cases and other authorities]. Section 21 of the California Warehouse Act (Stats. 1909, p. 436), provides: 'A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise.'" (94 Cal. App. at 571-572).

The various reasons why the courts in cases similar to the instant one refuse to uphold agreements to secure exemption from liability for loss or damage caused by negligence, are set forth in

Bisso v. Inland Waterways Corporation, 349 U. S. 85, 75 S. Ct. 629 (1955),

a case decided under admiralty law, but which has more general application. That case points out that these ex-

culpatory clauses are held invalid (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.

As is demonstrated above, the California courts and the California legislature have seen fit to apply those principles, and have announced a rule that warehousemen and other such bailees offering their services for hire to the public may not exempt themselves from liability for damages resulting from their own negligence nor relieve themselves from the duty to exercise reasonable care.

(2) As the City recognizes, the trial court made no findings on this claimed defense. One crucial and necessary allegation made by the City concerning this defense involves Appellant's "awareness" of the exculpatory clause. The Court may not affirm the judgment on the basis of this defense as there had been a failure to make a finding of fact on that critical issue.

> *Stokes v. Reeves,* 245 F. 2d 700, 702 (C. A. 9th 1957);
>
> *Deering-Milliken & Co. v. Modern-Aire of Hollywood,* 231 F. 2d 623, 627 (C. A. 9th 1956).

Moreover, there is no evidence at all on this crucial question of Appellant's "awareness." Consequently, the only permissible finding is that Appellant had no such "awareness" as will bind it in accordance with the alleged terms of the exculpatory clause.

(3) Another clear defense to this contention is that the Appellant is not bound by the alleged terms of the exculpatory clause for the reason that it was not a party to the contract. Preferential Berth Assignment No. 105

[Ex. D][7] was entered into between the City and another corporation not a party to this action. Applicable, therefor, is the holding of

California & Hawaiian Sugar R. Corp. v. Harris County, etc. Dist., 27 F. 2d 392 (S. D. Tex. 1928),

where the court stated:

". . . [T]he evidence is affirmative that these [exculpatory] provisions were never called to the plaintiff's attention. Such knowledge as the plaintiff had of them was that only which the law imputes to him from the fact that these tariffs were in the hands of the steamship company, which, in unloading the goods, acted as its agent, and such imputed knowledge cannot avail to bring home to the bailor that claimed exemptions from negligence in view of the fact (1) that they do not in terms seek to exempt from negligence, and (2) they are inserted in a general tariff, in which, since the law presumes responsibility for acts of negligence, in the absence of defendant's notice to the contrary, the plaintiff would not be expected to look for such exemption." (27 F. 2d at 394.)

A California decision to the same effect is

Fields v. City of Oakland, 137 Cal. App. 2d 602, 608-609, 291 P. 2d 145 (1955).

The City, however, makes the illogical argument that because Appellant was not a party to Preferential Berth

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[7]Appellee refers to Exhibit D, Preferential Berth Assignment No. 105 (Appellee's Br. p. 44). That exhibit, however, although marked for identification [R. 121], was never received in evidence, and is not a part of the record on this appeal. [R. 492.]

Assignment No. 105, the presence of its goods on the premises "was unlawful" and Appellant "was a trespasser or gratuitous licensee" (Appellee's Br. p. 44). The City's attempted dichotomy is improper. As appears from the Tariff, a preferential assignee is expected to place the goods of third parties on the City's docks and in the warehouses located there. Hence Appellant is a member of the public who is expected to be present on the premises under the terms of the contract made between the City and the preferential assignee. Appellant, therefore, was neither a trespasser nor a gratuitous licensee, and it is not bound by a contract to which it was not a party.

(4) Another short answer to the contention is that the provisions of Tariff Item 535(b), properly construed, do not exculpate the City for liability for its own negligence. The rules of construction applicable to exculpatory clauses were summed up in

Sproul v. Cuddy, 131 Cal. App. 2d 85, 280 P. 2d 158 (1955),

as follows:

> "Except where discountenanced by public policy or some statutory inhibition, a party may contract to absolve himself from liability for negligence; the law, however, looks with disfavor on such attempts to avoid liability or secure exemption from one's personal negligence, and construes such provisions strictly against the person relying on them, especially when he is the author of the document; to be sufficient as an execulpatory provision against one's own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties; and seemingly broad language will not be isolated from

its context and will be read with due regard to the maxim of strict construction." (131 Cal. App. 2d at 95.)

The language in Tariff Item 535(b) is obviously quite broad, but it does not by its terms refer to "negligence," and it does recognize that in some circumstances liability will exist. Most apt, therefore, is the following quotation from

Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal. App. 2d 578, 271 P. 2d 122 (1954):

"As stated in *Pacific I. Co. v. California, etc., Ltd., supra,* ' "the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company 'harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station' is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence." ' " (125 Cal. App. 2d at 595.)

(5) Still another answer to the contention is the fact that if Preferential Berth Assignment No. 105 were before this Court it would show that Paragraph 4 thereof provides that the agreement is "subject to the charter of the City of Los Angeles and to the orders, rules and regulations of the Board of Harbor Commissioners and

the ordinances of said city adopted in pursuance of said charter." That paragraph, therefore, is the sole vericle by which the so-called exculpatory clause found in Tariff Item 535 (b) (which is in City Ordinance No. 97,629) is imported into the Preferential Berth Assignment agreement. That agreement was entered into in 1946 and four years later the City enacted the said Ordinance No. 97,-629. Certainly it cannot be argued that by virtue of the said paragraph 4 of the agreement the parties intended that the City could at a later date unilaterally insulate itself from liability for its own negligence in these warehousing operations. In this connection, if Preferential Berth Assignment No. 105 were before this Court, paragraph 2 thereof would disclose that the City agreed that it would "at all times, at its own cost and expense, keep and maintain said wharf in good and safe condition of repair; . . ."

(6) A further answer to the contention is that Tariff Item 535 (b) is unconstitutional and void insofar as it purports to exempt the City from liability for negligence. California Constitution, Article XI, Sec. 8, provides that municipalities "may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." It is well settled in California that the liability of municipalities for the tortious acts of their servants appertains to the "general laws" and is not a "municipal affair."

Dept. of Water & Power v. Inyo Chem. Co., 16 Cal. 2d 744, 753, 108 P. 2d 410 (1940); and

Douglass v. City of Los Angeles, 5 Cal. 2d 123, 128, 53 P. 2d 353 (1935).

It follows, therefore, that paragraph 4 of Preferential Berth Assignment No. 105 did not incorporate Tariff Item 535 (b); it was not adopted "in pursuance" of the City charter because the charter empowered the City to legislate only with respect to municipal affairs.

VIII.

The Admission of the City's "Additional" Answer to Plaintiff's Interrogatories Was Both Erroneous and Prejudicial.

The City argues, *inter alia,* that even if it is assumed that the "additional" answer should not have been received in evidence, it is to be presumed that the trial court did not consider it. Obviously any such presumption is not conclusive. In this connection the City relies upon

> *Thompson v. Baltimore & O. R. Co.,* 155 F. 2d 767, 771 (C. C. A. 8th 1946),

which cites and quotes from

> *Thompson v. Carley,* 140 F. 2d 656, 660 (C. C. A. 8th 1944).

In the *Carley* case the court noted that there was nothing in the record to show that any finding of fact was based upon the challenged testimony, and stated:

> "This Court will not reverse a trial court in a non-jury case for having admitted incompetent evidence, whether objected to or not, unless all of the competent evidence is insufficient to support the judgment appealed from *or* unless it affirmatively appears from the record that the incompetent evidence complained of was relied upon by the trial court and induced the court to make an essential finding which would not otherwise have been made." (140 F. 2d at 660; emphasis added.)

As is demonstrated in Appellant's Opening Brief, pp. 76-80: (1) there is no competent evidence to the same effect as that contained in the "additional" answer to interrogatories here admitted in evidence, *and* (2) it is clear that the trial court relied upon this incompetent evidence in making findings of fact vitally affecting its conclusions in this case.

The City seeks to find some support in the testimony of its plumber foreman, Brashier. (Appellee's Br. p. 46) As was demonstrated, however, in another portion of this reply brief (*supra,* pp. 19-20), his testimony may not be cited for the proposition that there had been no corrosion failure in the immediate area of Berth 59.

The City attempts to justify its use of its own answer to an interrogatory propounded under Rule 33 by pointing out that Rule 33 provides that such answers may "be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party." The City then argues that Rule 26(d)(4) provides that if only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

It is immediately apparent that the language of Rule 26(d) is to some extent inapposite to the interrogatory prodecure under Rule 33. For example, there is no provision for anyone other than the answering party to be present or represented at the time the interrogatories are answered. Further, as this Court noted in

Haskell Plumbing & Heating Company v. Weeks
237 F. 2d 263, 267 (C. A. 9th 1956),

Rule 26(d) permits the use of depositions or portions thereof, "but only 'so far as admissible under the rules

of evidence.'" (237 F. 2d at 267.) Answers to interrogatories are admissible as admissions against the answering party, but as pointed out in Appellant's Opening Brief, pages 78-80, because they are self-serving hearsay evidence they are not under the rules of evidence admissible on behalf of the answering party if there is an objection.

As noted in Appellant's Opening Brief, page 77, footnote 1, this "additional" answer was entirely voluntary. It was not made after the granting of a motion for leave to amend its answer. No such motion was made. The City (which did not even include in the "additional" answer the reason for the correction) made this gratuitous attempted retraction, and then at the trial, when Appellant made proper use of the admission made in the original answer, the City was allowed over objection to put the retraction in evidence.

The City now argues that Appellant should have submitted additional interrogatories if it wished to ascertain the reason for the corrected answer. The City, however, cites no authority in support of its attempt to transfer to Appellant the burden of disproving the truth of an admittedly self-serving hearsay statement. If the City wished to disavow or retract its admission, it should have done so by the usual process of putting its witnesses on the stand so that they could be subjected to the test of cross-examination.

Answers to interrogatories under Rule 33 are much like responses to requests for admission under Rule 36. Professor Moore states as to those responses:

> "Answers to requests are not subject to cross-examination; except insofar as they constitute admissions against the interest of the answering party,

they should stand on no better footing than affidavits, which cannot be used as substantive evidence at a trial." (4 Moore's Federal Practice [2d ed.] Par. 36.09, p. 2730.)

IX.

Conclusion.

Appellant submits that the City has not presented any reason which justifies the "do nothing" policy doggedly adhered to in the circumstances of this case. Without attempting to summarize completely Appellant's views, it is apparent that the City either had actual knowledge that graphitic corrosion was occurring in pipelines at Berth 59, or it buried its municipal, proprietary head, ostrich-like, and voluntarily failed to avail itself of the tremendous fund of useful knowledge readily available concerning the corrosive character of the soil in the area of Berth 59 and the vulnerability to graphitic corrosion of the unprotected cast iron pipe which it had installed in such soil. The City simply installed the pipeline in 1914 and then for 42 years did nothing except fix breaks as and when they occurred.

The City complains in purported justification of its conduct that it was "uneconomical" and "impractical" for it to make adequate inspections of its pipelines in the area. But the City did not even maintain a reasonably vigilant lookout for water on the surface so that it could quickly implement its only maintenance policy in time to prevent damage. It did not (as it was bound to do under the evidence and the authorities) take notice that the pipe was liable to deteriorate from time and use; it did not even attempt to estimate the probable life of such pipe in the soil in the area of Berth 59 so that it could replace such

pipe just prior to the expiration of its ordinary life in such soil.

The City's conduct was clearly negligent by any standard, governmental or proprietary, and the trial court committed reversible error in determining that the City was not under any obligation to provide a safe place for the storage of Appellant's goods, and in proceeding to test the City's conduct by the governmental standard of care rather than by the correct proprietary standard.

It is submitted that the improperly admitted evidence in the form of a self-serving answer to an interrogatory was prejudicial error. It is further submitted that each of the findings of fact which is the subject of a specification of error on this appeal is "clearly erroneous," and that upon a review of the entire evidence this Court should be left with the definite and firm conviction that a mistake has been committed by each such finding, any one of which is sufficiently crucial to this case as to warrant a reversal of the judgment. Further, Appellant submits that if its contentions are sustained, it would be proper in the circumstances of this case for the Court to direct entry of judgment for plaintiff on the question of liability.

Respectfully submitted,

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